UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM ZELMAN, D.O.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 95-179-P-C***
	)	
BRIGHTON MEDICAL CENTER, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff is an osteopathic physician whose staff privileges at defendant Brighton Medical Center ("Brighton") are the focus of this lawsuit. Brighton's Board of Trustees voted in 1995 to terminate the plaintiff's privileges, ultimately moderating the sanction to a 30-day suspension -- but only after the plaintiff filed his initial complaint in this proceeding. In addition to Brighton, the defendants are three physicians -- James Flaherty, Emil Gotschlich and Robert McRea -- who, like the plaintiff, are specialists in obstetrics and gynecology and who, during the times relevant to this litigation, were also members of the Brighton medical staff. Also named as a defendant is Downeast Obstetrics and Gynecology ("Downeast"), a corporation owned by the three defendant physicians.[1]

The plaintiff's amended complaint (Docket No. 47) seeks damages from all defendants on claims of antitrust conspiracy and monopolization under federal law (Counts I and II), parallel claims alleging violations of Maine's antitrust statute (Counts III and IV), and state-law claims alleging

[1] The amended complaint also names as a defendant Frederick Meyerhoefer, who was Brighton's vice president of medical affairs during the times relevant to this litigation. The parties have stipulated to the dismissal with prejudice of all claims against Meyerhoefer. Stipulation and Order of Dismissal (Docket No. 98).

breach of the duty of good faith and fair dealing (Count VI) and tortious interference with advantageous economic relations (Count VIII). Additionally, the plaintiff seeks damages on a state-law claim of breach of contract solely against Brighton (Count V).[2]

Pending are Brighton's motion for summary judgment as to all claims (Docket No. 78), a similar motion filed by Downeast and its three shareholding physicians (Docket No. 81), and the plaintiff's motion for partial summary judgment on his breach-of-contract claim (Docket No. 77).[3]

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[2] Count VII, seeking damages for defamation from Downeast and the individually-named defendants, has been dismissed with prejudice by stipulation of the parties. Stipulation of Dismissal of Count VII of the Amended Complaint (Docket No. 68).

[3] Also pending is a motion filed by Flaherty, Gotschlich, McRea and Downeast seeking to strike from the summary judgment record certain evidence submitted by the plaintiff, and to prohibit the use of such evidence at trial (Docket No. 90). At issue are tapes made by the plaintiff of dozens of phone conversations -- some of which involved matters at issue in this litigation. The moving parties contend that they are entitled to a very significant sanction -- essentially amounting to the exclusion of all evidence submitted by the plaintiff on the issue of antitrust conspiracy -- based on the plaintiff's alleged failure to produce all of the tapes in discovery on a timely basis. The movants would also have the court draw the inference, based on circumstances surrounding the plaintiff's late disclosure of certain tapes found in his safety deposit box, that additional tapes existed but were destroyed by the plaintiff to avoid their production in discovery. The motion to strike relies on Fed. R. Civ. P. 37(b)(2), which authorizes the court to sanction the failure to obey an order to provide or permit discovery by making "such orders in regard to the failure as are just."

Although the plaintiff's conduct surrounding the making and disclosure of the tapes is troubling to say the least, I deny the motion to strike based on a lack of prejudice to the parties asserting the motion. The issues surrounding the tapes, and inspection of the plaintiff's safety deposit box, were the subject of a discovery hearing I conducted on July 23, 1996. *See* Report of Hearing and Order Re: Discovery Dispute (Docket No. 76). At that time, more than a month after the discovery deadline, I authorized the defendants to depose the plaintiff further concerning the existence, maintenance and production of all tape recordings made by him. *Id*. at 2. It is now the moving defendants' contention that they suffered prejudice based on an inability to depose *other* witnesses concerning the matters discussed in the taped conversations. Given that the moving parties point to no relevant tapes that had not been disclosed to the defendants by the plaintiff as of July 23, they could have and should have used the discovery hearing conducted on that date to raise the problem they now seek to bring to the court's attention. Having not done so, their present allegations of sanctionable prejudice ring hollow.

After a thorough and careful review of the summary judgment record, it is my view that the defendants are immune from money damages pursuant to the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq*., which protects hospitals and medical professionals from such liability in connection with peer review actions taken in furtherance of quality health care. Accordingly, and given that the amended complaint seeks no relief beyond money damages, it is my recommendation that the defendants' summary judgment motions be granted and that the plaintiff's motion for partial summary judgment be denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no

genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 1996 WL 733355 at *2 (1st Cir., Dec. 30, 1996) (citations omitted).

II. Factual Context

For purposes of evaluating the summary judgment motions filed by the defendants, the requisite plaintiff-favorable review of the record reveals the following:

The plaintiff is a doctor of osteopathic medicine, licensed to practice in Maine. Amended Complaint (Docket No. 47) ¶ 5; Answer of Defendants Brighton and Meyerhoefer ("Brighton Answer") (Docket No. 50) ¶ 5; Answer of Defendants Downeast, Flaherty, McRea and Gotschlich ("Downeast Answer") (Docket No. 51) ¶ 5. His area of practice is obstetrics and gynecology. Deposition of William Zelman ("Zelman Dep.") at 14. Defendants Brighton and Downeast are Maine corporations conducting business in Portland. Amended Complaint ¶¶ 6, 7; Brighton Answer ¶ 6; Downeast Answer ¶¶ 6,7. The shareholders of Downeast are defendants Flaherty, Gotschlich and McRea. Amended Complaint ¶ 7; Downeast Answer ¶ 7. Flaherty and McRea are doctors of osteopathic medicine, licensed in Maine, whose specialities are obstetrics and gynecology. Amended Complaint ¶¶ 8, 9; Brighton Answer ¶¶ 8, 9; Downeast Answer, ¶¶ 8, 9. Gotschlich is a doctor of allopathic medicine, licensed in Maine, whose speciality is also obstetrics and gynecology.

Amended Complaint ¶ 10; Brighton Answer ¶ 10; Downeast Answer ¶ 10.

Flaherty had become chair of the Brighton medical staff by 1992, which also made him a member of the hospital's Board of Trustees. Deposition of James Flaherty, D.O. ("Flaherty Dep.") at 14. From 1993 through 1994, McRea served as head of the obstetrics/gynecology section at Brighton. Deposition of Robert McRea, D.O. ("McRea Dep.") at 18.

Zelman applied to join the medical staff of Brighton in November 1992. Zelman Dep. at 719, 744. The "pre-application" Zelman submitted on November 30, 1992 acknowledged that any initial appointment would be provisional and that any reappointment would be "contingent upon [his] continued demonstration of professional competence and cooperation, [his] general support of the hospital . . . as well as the other factors deemed relevant to the hospital." Pre-Application For Professional Staff Membership, Exh. B to Statement of Material Facts filed by Brighton and Meyerhoefer ("Brighton SMF") (Docket No. 79), at 5. The pre-application also contained an acknowledgment that Zelman had received, had an opportunity to read, and agreed to abide by Brighton's bylaws applicable to professional staff appointees. *Id.*

It was also in the fall of 1992 that the plaintiff met with Flaherty, Gotschlich and McRea to discuss the establishment of a joint coverage arrangement, Affidavit of William Zelman, D.O. ("Second Zelman Aff."), appended to Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Memorandum") (Docket No. 85), at ¶ 9, which presumably involved those doctors providing services to the plaintiff's patients at times when the plaintiff was not available. The three doctors tried to persuade the plaintiff to establish his practice elsewhere, told the plaintiff they would not provide coverage for him and, in the case of Flaherty, even went so far as to tell the plaintiff explicitly that they did not want him in the Portland medical community.

Id. Only after the plaintiff obtained coverage elsewhere did Flaherty, Gotschlich and McRea change their minds and agree to provide coverage to the plaintiff, although they refused to permit the plaintiff to cover for them on a reciprocal basis --something that would have been financially advantageous to the plaintiff. *Id.* at ¶ 10.

The plaintiff found the length of time that it took to gain approval of his application to be frustrating, and he therefore pressed Brighton to act. *Id.* at ¶ 11. The hospital's vice president of medical affairs, Frederick Meyerhoefer, was of the opinion that the plaintiff had been "rude," "confrontational" and "abrasive" with members of his staff during the pendency of the application. Deposition of Frederick P. Meyerhoefer, M.D. ("Meyerhoefer Dep.") at 5-6, 65. Eventually Meyerhoefer asked Gotschlich to review the application. Second Zelman Aff. at ¶ 11. Gotschlich conducted this review because McRea, who would normally perform such a task, was on vacation. Meyerhoefer Dep. at 73-74. McRea also reviewed the application upon his return from vacation. McRea Dep. at 31.

In reviewing the plaintiff's application as section head, McRea believed that some issues needed to be addressed before he could recommend the appointment to Brighton's Credentials Committee. *Id*. One he referred to as a "citizenship question" involving his relations with the nursing staff and "ancillary people" at a previous job in Rhode Island.[4] *Id*. Another was a "gap" in the plaintiff's professional work history. *Id*. at 31-32. McRea nevertheless made a favorable recommendation on the plaintiff's application. *Id.* at 36.

Brighton's Credentials Committee, with Flaherty serving as chair, approved the application

[4] It is the plaintiff's position that he "got along well with colleagues, staff and patients" during his employment in Rhode Island. Second Zelman Aff. ¶ 5. The quality of the plaintiffs' interpersonal relations at his previous job is not material to the issues presently in dispute.

for staff membership on March 3, 1993.[5] Brighton Medical Center Credentials Committee Minutes dated Mar. 3, 1993 ("Mar. 3 Minutes"), Exh. I to Brighton SMF, at 2; Flaherty Dep. at 56. The appointment was a provisional one, for a period of 12 months. Mar. 3 Minutes at 2. Further, the minutes of the credentials committee contain the following notation:

> After extensive discussion regarding Dr. Zelman's reported and demonstrated difficulties with interpersonal relationships with nursing and administrative personnel, it was moved and seconded to recommend approval of this application to the [Staff Executive Committee] on the condition that there are quarterly reports submitted to the committee from the Section Head, Head Nurse of Obstetrics and Gynecology, and the Head Nurse of the Operating Room regarding citizenship.

Id. The minutes reflect that this condition was approved by the Credentials Committee. *Id.*

Brighton's Staff Executive Committee took up the plaintiff's request for staff privileges on April 5, 1993. Meyerhoefer Dep. at 78-79; Flaherty Dep. at 103, 106; Brighton Medical Center Staff Executive Committee Minutes dated Apr. 5, 1993 ("Apr. 5 Minutes"), Exh. K to Brighton SMF, at 4. Although not a member of the Staff Executive Committee, Flaherty was in attendance to report on the recommendation of the Credentials Committee. Flaherty Dep. at 105-06. The minutes of that meeting reflect "extensive discussion regarding Dr. Zelman's reported and demonstrated difficulties with interpersonal relationships with nursing and administrative personnel." Apr. 5 Minutes at 4. The Staff Executive Committee voted unanimously to recommend approval of the plaintiff's application to Brighton's Board of Trustees, subject to the same condition regarding quarterly reports

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[5] Brighton asks the court to determine for summary judgment purposes that Flaherty voted in favor of the plaintiff's application. Brighton SMF at ¶ 24. However, the deposition testimony cited in support of this assertion does not so demonstrate. It involves Flaherty being asked, "Why . . . did you vote to approve . . . his application, then?" Flaherty Dep. at 77. It is not clear from the context whether the "you" being referred to was Flaherty individually or the credentials committee generally. In his response, Flaherty appeared to take care to avoid stating what he, personally, did. *See id.* ("[i]t was felt there was [sic] not solid enough grounds to deny the application" and "it was hoped that by pointing out to him . . .").

that appeared in the minutes of the Credentials Committee. *Id.* at 4-5; Meyerhoefer Dep. at 83.

The Professional Committee, a subcommittee of Brighton's Board of Trustees charged with making recommendations to the Board concerning medical staff appointments, took up the plaintiff's application on April 14, 1993. Meyerhoefer Dep. at 82; Brighton Medical Center Professional Committee Minutes dated Apr. 14, 1993, Exh. M to Brighton SMF, at 2. Flaherty was among those present. *Id.* at 1. The Professional Committee recommended approval of the plaintiff's application, rejected the recommendation concerning quarterly reporting, but recommended to the full Board of Trustees that it instruct Meyerhoefer to write the plaintiff a letter expressing the institution's concerns about the plaintiff's personal interactions. *Id.* at 2.

Later that day, the full Board of Trustees approved the Professional Committee's recommendations concerning the plaintiff. Brighton Medical Center Board of Trustees Minutes dated Apr. 14, 1993 ("1993 Board Minutes"), Exh. N to Brighton SMF, at 6. Flaherty was present at this meeting as well.[6] *Id.* at 1; Flaherty Dep. at 115. The Board formally requested that Meyerhoefer write the plaintiff a "strong letter putting him on notice regarding his inappropriate behavior during the application process and emphasizing that this type of behavior will not be tolerated from any member of the Medical Staff." 1993 Board Minutes at 6. On April 15, 1996 Meyerhoefer wrote the plaintiff to inform him of bhe Board's actions, warning him about

[6] Brighton, Downeast and the individual defendants ask the court to determine for summary judgment purposes that Flaherty abstained when the plaintiff's application came up for a vote before the Professional Committee; Brighton makes the same assertion as to the decision of the full Board of Trustees. Brighton SMF at ¶¶ 32, 37; Statement of Material Facts of the Defendants, Downeast Obstetrics and Gynecology, et al. ("Downeast SMF") (Docket No. 83) at ¶ 28. As to the former body, Flaherty so testified. Flaherty Dep. at 113. However, as the plaintiff points out, the minutes of neither meeting reflect any abstentions, and Flaherty testified that it was Brighton's practice to record abstentions in meeting minutes. *Id.* at 272. For purposes of the defendants' summary judgment motions, the court must therefore infer that Flaherty did not abstain at either meeting.

"significant concerns raised by [his] inappropriate behavior during the application process," noting that "cooperative behavior is considered paramount to a physician's performance at this hospital" and advising that his ability to cooperate with other staff members would "constitute a major factor" when his reappointment came up at the end of his provisional year. Letter of Frederick P. Meyerhoefer to William Zelman dated Apr. 15, 1993, Exh. O to Brighton SMF.

The plaintiff's provisional year at Brighton was not without controversy. In August 1993 a staff member from the hospital's laboratory filled out a "confidential report of hospital concern" reporting a disagreement with the plaintiff over administering certain tests on a patient as required by hospital protocol. Confidential Report of Hospital Concern dated Aug. 5, 1993, Exh. 17 to Downeast SMF. In October 1993 a second concern report was filed -- this one involving a confrontation with a nurse. Confidential Report of Hospital Concern dated Sept. 10, 1993, Exh. 18 to Downeast SMF. McRea became involved in the latter situation, in a manner the plaintiff regarded as "belligerent." Second Zelman Aff. at ¶ 21. It was also in October that McRea and Gotschlich themselves began to raise concerns about the quality of care Zelman had delivered to patients at the hospital, in some instances regarding treatment that had been provided as much as six months earlier. *Id.*

The issue of peer review began to loom large at this point. Brighton's bylaws provided that provisional appointees such as the plaintiff were subject to a process of "retrospective review, concurrent monitoring and/or direct observation." Brighton Medical Center, Bylaws of the Professional Staff Appointees and Related Manuals, 1993 ("Bylaws"), Exh. G to Brighton SMF, at ch. III, ¶ 3.7-1. This section of the bylaws provided for mandatory review of the physician's

performance by his department[7] chair, section head and other members of the staff "specifically delegated these tasks by said Chair or Head." *Id.* However, during the plaintiff's probationary year the obstetrics/gynecology section did not conduct any peer review discussions at its monthly meetings, something that occurred routinely in other sections at Brighton. Second Zelman Aff. at ¶ 19.

What the obstetrics/gynecology section did have was a proctoring system involving "retrospective chart review" of the plaintiff's cases by Flaherty, Gotschlich and McRea -- the only other physicians at Brighton who, as surgeons in the specialty of obstetrics/gynecology, were qualified to conduct such reviews of the plaintiff's work.[8] McRea Dep. at 86, 92-93. The results of McRea's proctoring took a decided turn for the worse, at least from the plaintiff's perspective, in

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[7] Brighton's bylaws placed the obstetrics/gynecology section within its department of surgery. Bylaws at ch. III, ¶ 9.1-1(b).

[8] The plaintiff's factual assertions concerning the system of proctoring and/or retrospective chart review are gleaned almost exclusively from his memorandum of law in opposition to the defendants' summary judgment motions. *See* Plaintiff's Memorandum at 9-11. They do not appear in the two formal Statements of Material Facts in Dispute that the plaintiff has either appended to or included in this memorandum. *See id.* at 28-32 and Attachment. The submission of such factual statements is required by Local Rule 19(b)(2), which stresses that the facts alleged in the corresponding factual statement required of the moving party will be "deemed to be admitted unless properly controverted by the statement required to be served by the opposing party." Parties in a summary judgment proceeding "are bound by their Rule 19 Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein." *Pew v. Scopino*, 161 F.R.D. 1 (D. Me. 1995). This rule is particularly important in a case such as this one that presents a voluminous summary judgment record for the court to consider. A party is extremely ill-advised to assume the court will look anywhere outside the four corners of the Local Rule 19 factual statements in ruling on a summary judgment motion.

For the sake of clarity, I will refer to the Statement of Material Facts appearing as an attachment to the plaintiff's memorandum as "Plaintiff's SMF." It is this factual statement that seeks to controvert its counterparts in the defendants' filings. The additional factual statement, embedded in the plaintiff's memorandum of law and providing additional factual assertions deemed material by the plaintiff, will be referred to by reference to the appropriate page number in the memorandum.

the latter half of 1993. Of the three cases proctored by McRea in June 1993, the plaintiff had received grades of 1 or 2, on a scale of 1 to 4, in all of the rated categories. *Id.* at 85 and Exh. 181 thereto (Procedure Proctoring Reports completed by Robert H. McRea) ("McRea proctoring reports").[9] McRea evaluated one of the plaintiff's cases in July 1993, giving it grades of 2 and 3. *Id.* However, from September 15 to October 4, McRea reviewed four of the plaintiff's cases and assigned to each an overall grade of 4, representing treatment regarded as "inadequate." *Id.* Gotschlich had separately evaluated two of these cases and assigned each an overall grade of 2, representing work considered "adequate."[10] Gotschlich Dep. at 75-76 and Exh. 149 thereto (Procedure Proctoring Reports completed by Emil Gotschlich).

On October 22, 1993 Meyerhoefer advised the plaintiff that Brighton had retained the services of an outside physician, John Zerner, M.D., to review the plaintiff's cases. Letter of Frederick P. Meyerhoefer to William Zelman dated Oct. 22, 1993 ("Oct. 22 letter"), Exh. 191 to Meyerhoefer Dep. Meyerhoefer advised the plaintiff that Zerner had been chosen to assure an

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[9] The plaintiff has submitted deposition exhibits in a separate set of bound volumes, appended to Plaintiff's SMF. All referenced deposition exhibits appear therein.

[10] Comparing the proctoring reports prepared by McRea to those prepared by Gotschlich, the plaintiff asks the court to determine for summary judgment purposes that McRea's are "bogus" and thus probative of an antitrust conspiracy. Plaintiff's Memorandum at 31. It would be improperly speculative, to say the least, for the court to infer any sinister motive in McRea's having stated medical opinions that differ from Gotschlich's, absent evidence that goes beyond the bare fact that the opinions differed.

As further evidence of an antitrust conspiracy, the plaintiff asks the court to credit Brighton's having provided Downeast with "computer generated financial information concerning Zelman on the anniversary of his first year at [Brighton]." *Id.* To support this contention, the plaintiff cites an exhibit that does, indeed, appear to be financial information about treatment provided at Brighton by Zelman, Flaherty, McRea and Gotschlich. However, the plaintiff cites nothing that would permit the court to determine that this data passed from Brighton to Downeast and I am therefore unable to draw the inference requested by the plaintiff.

objective review, untainted by questions of bias, self-interest or economic competition with the plaintiff. *Id.;* Second Zelman Aff. at ¶ 22; Meyerhoefer Dep. at 113. Among the cases assigned to Zerner for review were the four that had received grades of "inadequate" from McRea. Oct. 22 letter; McRea proctoring reports. Zerner evaluated 27 of the plaintiff's cases and, although he set out what he characterized as some "small areas" of criticism in connection with seven of the cases, he characterized the plaintiff's work overall as of "superior quality."[11]

As the plaintiff's provisional year drew to a close, tensions escalated. Flaherty, Gotschlich and McRea sent the plaintiff a joint letter, dated April 2, 1994, informing him that they were changing the basis for covering his practice when the plaintiff was unavailable. Letter of James Flaherty et al. to William Zelman dated Apr. 2, 1994, Deposition Exh. 113. In addition to retaining the right to bill the plaintiff's patients for any services provided, the three doctors told the plaintiff they would charge him $1,000 for each day or fraction thereof that he required their coverage. *Id.* This was financially onerous for the plaintiff, and he discontinued the coverage relationship with his three Brighton colleagues and began obtaining such services from doctors practicing at another Portland facility, Mercy Hospital. Second Zelman Aff. at ¶ 31.

Two days after the date of the coverage letter, McRea -- acting in his capacity as head of the obstetrics/gynecology section -- asked Gotschlich to conduct another review of the plaintiff's cases. Letter of Robert H. McRea to Frederick Meyerhoefer dated Apr. 4, 1994, Exh. U to Brighton SMF. According to McRea, this review raised new concerns about the quality of care being provided by

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[11] Zerner's written report (hereinafter "Zerner report"), dated October 25, 1993 and in the form of a letter addressed to Meyerhoefer, appears in the collection of deposition exhibits submitted by the plaintiff. It is marked as Deposition Exhibit 99. The plaintiff does not indicate, and it is not otherwise apparent from the record, to which deposition or depositions this document is an exhibit.

the plaintiff to Brighton patients. *Id.* McRea wrote a confidential letter to Meyerhoefer indicating that he would schedule a meeting of the entire obstetrics/gynecology section at which the cases in question would be discussed with the plaintiff. *Id.*; Second Zelman Aff. at ¶ 27. The meeting took place on May 19, 1994, but the plaintiff did not attend. Brighton Medical Center Section of Obstetrics and Gynecology Minutes dated May 19, 1994 ("Ob/Gyn Section Minutes"), Exh. V to Brighton SMF at 1; Second Zelman Aff. at ¶ 38.

Although it is the defendants' position that the plaintiff simply refused to attend this meeting, Brighton SMF at ¶ 52; Downeast SMF at ¶ 45, for summary judgment purposes the court must take note of the plaintiff's explanation that he declined to attend in part because Brighton would not provide him in advance with a list of issues to be discussed,[12] Second Zelman Aff. at ¶¶ 36, 38. In any event, because the plaintiff was absent from the meeting, those in attendance declined to make any recommendations or draw any conclusions from their review of the plaintiff's work on the cases in question. Ob/Gyn Section Minutes at 4.

McRea advised the plaintiff in writing on May 27, 1994 that the obstetrics/gynecology section would be meeting on June 1 to take up two of the cases discussed at the previous meeting. Letter of Robert McRea to William Zelman dated May 27, 1993 [sic], Exh. X to Brighton SMF. McRea's letter to the plaintiff stated that it was "exceedingly important" that the plaintiff attend this meeting, reminding him that "[o]ne responsibility of Professional Staff appointment is to participate

[12] It is the plaintiff's position that the failure to provide such a list to him in advance of the section meeting is a violation of Brighton's bylaws. Second Zelman Aff. at ¶ 36. My review of the relevant sections of the bylaws does not reveal such a requirement. The bylaws do, however, contain a provision indicating that when a section head requires "further information" from a candidate for reappointment, the section head must "notify the staff member, in writing, of [the] information required." Bylaws at ch. 1, ¶ 2.3

in the Medical Center's quality review and risk management activities." *Id.* The plaintiff responded in writing on May 31, advising that he had been out of town from May 26 through May 31 and would therefore be "unable to participate in any peer review" at the following day's scheduled meeting. Letter of William Zelman to Bob McRea dated May 31, 1994, Exh. Y to Brighton SMF. The plaintiff attended the meeting but declined to discuss any of his cases, citing "lack of preparation time." Second Zelman Aff. at ¶ 41.

Consistent with these gathering clouds, the storm began to break on July 19, 1994 when McRea -- in his capacity as head of the obstetrics/gynecology section -- formally recommended that the plaintiff's status as a provisional (i.e., not permanent) member of the staff be continued for another year. SCU Director, Section Head and Department Chair Review dated July 19, 1994, Exh. Z to Brighton SMF. Of the seven categories the form required McRea to evaluate, he assigned a rating of "unsatisfactory" to three: "[p]rofessional judgment," "[t]echnical skill" and "[c]ooperativeness, ability to work with others." *Id.* The remaining four areas -- "[b]asic medical knowledge," "[c]linical competence," "[p]hysician-[p]atient relationship" and "[p]articipation in Medical Staff committees and affairs" -- received the other possible rating of "satisfactory." *Id.*

Brighton's Administrative Affairs Committee -- formerly the Credentials Committee -- took up the question of the plaintiff's reappointment on July 27. Meyerhoefer Dep. at 221; Brighton Medical Center Administrative Affairs Committee Minutes dated July 27, 1994, Exh. 1 to Brighton SMF, at 1. The committee endorsed McRea's recommendation unanimously. *Id.* at 4. Flaherty, although a member of this committee, was not present at the meeting. *Id.* at 1. Next, the issue went before Brighton's Staff Executive Committee, which on August 4 adopted the recommendation that the plaintiff's provisional status be continued for an additional year. Brighton Medical Center Staff

Executive Committee Minutes dated Aug. 4, 1994, Exh. 2 to Brighton SMF, at 1. The minutes reflect that Flaherty "recused himself from all discussion and voting on this issue." *Id.*

On September 14 and 21, respectively, the Professional Committee of the Board of Trustees and then the full Board adopted the recommendation that the plaintiff's provisional status be extended for an additional year, with the continued monitoring of his cases required by the bylaws for provisional members of the medical staff. Brighton Medical Center Professional Committee Minutes dated Sep. 14, 1994 ("Sep. 14 Minutes"), Exhibit 28 to Downeast SMF, at 9; Brighton Medical Center Board of Trustees Minutes dated Sep. 21, 1994 ("Sep. 21 Minutes"), Exhibit 3 to Brighton SMF, at 9. Flaherty, although a member of both the Board and its Professional Committee, recused himself on each instance. Sep. 14 Minutes at 9; Sep. 21 Minutes at 9. The Board, on recommendation of the Professional Committee, determined that the plaintiff's letter of reappointment should "include an admonition that he must participate fully in Department and Section peer review activities." Sep. 14 Minutes at 9; Sep. 21 Minutes at 9. Consistent with the Board's action, Meyerhoefer wrote the plaintiff the following day to advise him of the status of his reappointment and to advise him of the Board's "significant concerns" about his participation in peer review. Letter of Frederick P. Meyerhoefer to William Zelman dated Sep. 22, 1994, Exh. 4 to Brighton SMF.

The plaintiff's dispute with his Brighton colleagues over peer review raged on nevertheless. By letter dated September 20, 1994, McRea, in his capacity as head of the obstetrics/gynecology section, advised the plaintiff that two of his cases would be the subject of discussion at a section meeting scheduled for October 5. Letter of Robert McRea to William Zelman dated Sep. 20, 1994, Exh. 32 to Downeast SMF, at 1; Letter of William Zelman to Robert McRea dated Sep. 22, 1994,

Exh. 6 to Brighton SMF. The plaintiff replied with a two-sentence, faxed letter asking McRea to state the purpose of the review. *Id.* Then, on the day before the scheduled October 5 section meeting, the plaintiff sent Gotschlich (in his capacity as acting section head, apparently in McRea's absence) a letter stating that the plaintiff would be unable to attend the meeting "due to an urgent personal matter." Letter of William Zelman to Emil Gotschlich dated Oct. 4, 1994, Exh. 33 to Downeast SMF, at 2. The plaintiff did not, in fact, attend the meeting, which began shortly after 8:00 a.m. and lasted approximately an hour. Brighton Medical Center Section of Obstetrics and Gynecology Minutes dated Oct. 5, 1994, Exh. 34 to Downeast SMF, at 1-2. Two days later, Meyerhoefer -- in his capacity as vice president for medical affairs -- demanded to be informed of the nature of the personal matter that had kept the plaintiff from the meeting. Letter of Frederick P. Meyerhoefer to William Zelman dated Oct. 7, 1994, Exh. 36 to Downeast SMF. Meyerhoefer accused the plaintiff of having been in his office, seeing patients, on the morning of October 5. *Id.* The plaintiff, however, was not seeing patients during the scheduled meeting time. Second Zelman Aff. at ¶ 43. Receiving no response, Meyerhoefer wrote another letter to the plaintiff on October 21, demanding an explanation by the close of business on October 28. Letter of Frederick P. Meyerhoefer to William Zelman dated Oct. 21, 1994, Exh. 9 to Brighton SMF. The plaintiff responded, one day before the deadline, by stating that he did not consider it appropriate for the hospital's administration to "pry" into his "personal affairs." Second Zelman Aff. at ¶ 44.

Also on that date, the plaintiff wrote Meyerhoefer to complain that the peer review process as it had been applied to him by McRea was "unfair" and "intended to attack rather than determine [the plaintiff's] clinical competency." Letter of William Zelman to Frederick P. Meyerhoefer dated Oct. 27, 1994, Exh. 10 to Brighton SMF, at 1. Nevertheless, the plaintiff attended a November 2,

1994 section meeting at which two cases were discussed and two were deferred because of lack of time.[13] Brighton Medical Center Section of Obstetrics and Gynecology Minutes dated Nov. 2, 1994 ("Nov. 2 Minutes"), Exh. 13 to Brighton SMF. As the December section meeting approached, the plaintiff advised Gotschlich, in his capacity as acting chair of the section, that the plaintiff would be "unable" to answer questions at that meeting about a particular case of the plaintiff's that had been scheduled for discussion. Letter of William Zelman to Emil Gotschlich dated Dec. 5, 1994 ("Dec. 5 Letter"), Exh. 16 to Brighton SMF. The plaintiff cited the "unfairness" of the peer review process as it had been applied to him. *Id.* When the meeting convened on December 7, the plaintiff refused to discuss the second case on the agenda and left the meeting.[14] Brighton Medical Center Section of Obstetrics and Gynecology Minutes dated Dec. 7, 1994, Exh. 17 to Brighton SMF, at 2.

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[13] Brighton implies that the deferred cases, as well as those actually discussed at the November 2 meeting, were the plaintiff's. *See* Brighton SMF at ¶ 82. The evidence cited for this proposition, i.e., the minutes of the meeting, do not identify any of these cases as the plaintiff's. Nov. 2 Minutes.

[14] Relying solely on the minutes of this meeting, it is the position of both Brighton and Downeast that the plaintiff "refused to participate" in the December 7, 1994 case review altogether. Brighton SMF at ¶¶ 86, 88; Downeast SMF at ¶ 74. Putting aside the question of whether the minutes would themselves be admissible to prove anything about what the plaintiff did nor did not do on December 7, the minutes establish only that the plaintiff refused to discuss the second of the two cases that were on the agenda and thus left the meeting. Further, it is the plaintiff's position that his actions at the December 7 meeting reflect the fact that he was "uncertain whether the case was actually to be reviewed" in light of "inconsistent letters" he had received from McRea and Gotschlich, the former suggesting that review of at least some of the plaintiff's cases would thenceforth be conducted only in writing. Plaintiff's SMF at 5; *see* Letter of Robert McRea to William Zelman dated Dec. 1, 1994, Exh. 14 to Brighton SMF, at 1. For this proposition, the plaintiff cites McRea's agreement at his deposition that it would have been "understandable" for the plaintiff to have been confused, in light of the aforementioned inconsistent letters, about whether the case would be reviewed. Plaintiff's SMF at 5, citing McRea Dep. at 253. This is an attempt to spin gold out of straw. It is apparent from the plaintiff's December 5 letter to Gotschlich that he knew precisely which case was on the agenda and that, whatever instructions he received from McRea and Gotschlich, he planned to refuse to participate. *See* Dec. 5 Letter.

This is the point at which the plaintiff's continued association with Brighton became a matter of formal discussion at the hospital. In his capacity as chair-elect of the obstetrics/gynecology section, Gotschlich, who would therefore be assuming the chair the following month, wrote to Meyerhoefer to express "extreme frustration" with the plaintiff's "lack of cooperation in peer review." Letter of Emil Gotschlich to Fred [Meyerhoefer] dated Dec. 7, 1994, Exh. 18 to Brighton SMF. Meyerhoefer acted decisively one week later, sending a "Request for Corrective Action" to the hospital's Staff Executive Committee. Letter of Frederick P. Meyerhoefer to Kenneth Lageroos et al. dated Dec. 14, 1994 ("Dec. 14 Letter"), Exh. 19 to Brighton SMF. Pursuant to Article 6 of Brighton's bylaws, this was the procedure for investigating actions that constitute "grounds for denial, suspension, or termination of staff appointment." Bylaws, ch. III, ¶ 6.1. Although Meyerhoefer took this action in response to Gotschlich's written expression of frustration, Meyerhoefer initiated the formal "corrective action" proceedings under the bylaws without consulting or seeking the approval of Gotschlich, McRea or Flaherty. Meyerhoefer Dep. at 253-54, 260-61. Meyerhoefer's nine-page letter to the Staff Executive Council discussed three broad categories of complaints against the plaintiff, *viz*, his "continual and longstanding pattern of refusal to participate in ob/gyn section peer review of his cases," the submission of "inaccurate operative reports which were not timely, accurately or properly amended and clarified," and the "failure to respond to an investigation by [Gotschlich, in his capacity as vice president for medical affairs] regarding Dr. Zelman's failure to attend the October 5, 1994 section meeting at which cases were

to have been discussed in peer review."[15] Dec. 14 Letter at 1, 7, 8.

Meeting on the same date as Meyerhoefer's letter requesting the corrective action, the Staff Executive Council determined by vote that it had "sufficient evidence" to evaluate the allegations without conducting a further investigation, and then voted to recommend to the Board of Trustees that the plaintiff be terminated from the Brighton Medical Center staff. Brighton Medical Center Staff Executive Committee Minutes dated Dec. 14, 1994, Exh. 20 to Brighton SMF. Flaherty was present at this meeting but recused himself and did not participate. *Id.* at 1; Flaherty Dep. at 304.[16]

The Brighton bylaws entitled the plaintiff to respond to this recommendation by invoking the hospital's "Fair Hearing Plan." Bylaws, ch. III, ¶ 6.6-4. In general, this plan permitted a staff practitioner to receive a formal hearing, followed by appellate review by the Board of Trustees, before being subject to any serious sanctions related to one's status as a staff member. *See generally id.* at ch. II. Pursuant to the Fair Hearing Plan, a Fair Hearing Committee conducted a hearing on March 1 and 2, 1995. Report of Fair Hearing Committee ("Fair Hearing Report"), Exh. 22 to Brighton SMF, at 1. The committee consisted of three doctors -- Louis Hanson, Kurt Ebrahim and

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[15] The plaintiff's position, as stated in his Statement of Material Facts, is that Meyerhoefer's asserted reasons for his action are false, and that he made the request for corrective action "in furtherance of the conspiracy with Downeast and the Downeast Doctors and in order to try to keep Downeast from moving its practice to Mercy," another local hospital. Plaintiff's SMF at 6. Given my recommended disposition of the case, it is not necessary to reach the plaintiff's allegations of conspiracy.

[16] Flaherty asserts that he attended because he is an "intensely curious person" who "wanted to be educated as to what was going on and what other people thought" about the issues being discussed. Flaherty Dep. at 304. The plaintiff, citing issues of credibility, challenges the defendants' assertions concerning Flaherty's level of participation and his motives for attending the meeting. Plaintiff's SMF at 6. Flaherty's sworn testimony that he did not participate in the discussion is uncontroverted. But it would be inappropriate in the present context to draw any inferences favorable to Flaherty concerning his reasons for attending the meeting.

Patricia Phillips -- with attorney Claudia Raessler serving as hearing officer. *Id.*; Affidavit of James W. Donovan ("Donovan Aff."), Exh. 56 to Brighton SMF, at ¶ 11. Meyerhoefer attended as the representative of the Staff Executive Committee, with the representation of the hospital's outside counsel. Fair Hearing Report at 1. The plaintiff attended and was also represented by counsel. *Id.*

The results of the Fair Hearing process were at least somewhat favorable to the plaintiff. The Fair Hearing Committee concluded that the alleged conduct concerning peer review "resulted from the joint actions of Dr. Zelman and the OB/GYN Section." *Id.* at 7. Noting the absence of a "definitive standard" in Brighton's bylaws concerning full participation in peer review, the Fair Hearing Committee determined that it lacked a substantial factual basis for determining that the plaintiff had established a continual and longstanding practice of refusing to participate in peer review as alleged. *Id.* However, the committee criticized as "problematic" the plaintiff's refusal to "participate and cooperate in addressing quality care concerns," and suggested that he should have made better use of the "medical staff and administrative channels available to him so as to facilitate a cooperative and harmonious practice environment." *Id.* at 9. The committee found "inadequate evidence" to support the allegation concerning material misrepresentations on operative and surgical records. *Id.* at 10. Finally, the panel characterized as "misrepresentation by omission" the plaintiff's failure to explain his absence from the October 5, 1994 peer review meeting. *Id.* at 11.

The bottom line was that the Fair Hearing Committee did not adopt the ultimate recommendation of the Staff Executive Committee for revocation of the plaintiff's staff privileges. Instead, it recommended a suspension of up to two weeks in the plaintiff's clinical privileges. *Id.* Further, the Fair Hearing Committee called on the obstetrics/gynecology section to establish a peer review process that "demonstrate[s] adherence to the fundamental principles of fairness" and called

on the plaintiff to "cooperate fully and work constructively towards being an integral member of the Section." *Id.* at 11-12. Finally, concerning the proctoring applicable to the plaintiff as a provisional member of the staff, the Fair Hearing Committee called on the hospital "to identify proctors who, as a result of their practice areas, are not in a position to be considered 'direct economic competitors' as this term is defined and understood for purposes of the Health Care Quality Improvement Act of 1986." *Id.* at 12.

Notwithstanding the results of the hearing, the Staff Executive Committee did not back down from its confrontation with the plaintiff. The Fair Hearing Plan permitted both the plaintiff and the Staff Executive Committee to submit written comments on the hearing report to the Board of Trustees. Bylaws, ch. II, ¶ 4.1. The Staff Executive Committee issued 40 pages of written comments, concluding with its unanimous opinion that its initial recommendation -- outright revocation of the plaintiff's staff privileges -- remained the appropriate action for the Board of Trustees to take. Letter of Kenneth Lageroos et al. to Richard Roy dated Apr. 13, 1995, Exh. 24 to Brighton SMF, at 41. The committee members who so voted were its chair, Kenneth Lageroos, as well as Laureen Biczak, Harry Payton, Daniel Campos and James Place. *Id.* The minutes of the committee's April 4, 1995 meeting reflect that Flaherty, a member of the committee, was present but did not vote on the issue of the plaintiff's staff privileges. Brighton Medical Center Staff Executive Committee Minutes dated Apr. 4, 1995, Exh. 23 to Brighton SMF, at 3. He did, however, review the committee's written comments when they were in draft form,[17] and thus participated in the

[17] Flaherty's testimony at his deposition was that he had absolutely no involvement in the preparation of this document. Flaherty Dep. at 324. However, at the deposition Flaherty was shown a draft copy of the letter, produced in discovery by Downeast, that included marginal notations that Flaherty agreed were in his handwriting. *Id.* at 323-24. Flaherty's explanation was that it is (continued...)

process at least to that extent.

The plaintiff also submitted comments to the Board, through counsel, arguing that there was "no basis whatsoever to suspend Dr. Zelman's clinical privileges." Letter of Jerrol A. Crouter to Brighton Medical Center Board of Trustees dated Apr. 13, 1995, Exh. 25 to Brighton SMF, at 1. Further, the plaintiff received a copy of the Staff Executive Committee's submission to the Board and, again through counsel, submitted comments about it prior on the date of the Board's meeting. Letter of Jerrol A. Crouter to Richard Roy dated Apr. 24, 1995, Exh. 26 to Brighton SMF.

Brighton's Board of Trustees voted on April 24, 1995 to revoke the plaintiff's staff appointment.[18] Donovan Aff. at ¶ 17. The vote was unanimous with the exception of one abstention by Board member Bradley McCurtain. *Id.* Flaherty was present at the meeting in his capacity as a Board member but did not participate in the discussion of the plaintiff's status and did not vote. *Id.*

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[17](...continued)
"possible" he reviewed the draft of the letter after it was submitted in final form. *Id.* at 324. A plaintiff-favorable review of the record supports the inference that Flaherty participated in the drafting of the letter prior to its submission.

[18] In support of his contentions concerning the existence of an antitrust conspiracy, the plaintiff contends that the Board of Trustees made this decision on the same day it heard a report concerning the possibility that McRea, Flaherty and Gotschlich would move their practice to Mercy Hospital. Plaintiff's Memorandum at 32. The cited portions of the record do not support such an inference. Page 145 of the Donovan Deposition, cited by the plaintiff, simply reveals that the three doctors did, in fact, ultimately move at least the bulk of their practice to Mercy. The minutes of the April 24 meeting, also cited by the plaintiff, reveal only that, prior to taking up the plaintiff's status, the Board learned that the Brighton administration had made certain "adjustments" to the report of the merger transition team in light of a meeting between the president of Brighton and the three Downeast doctors. Brighton Medical Center Board of Trustees Minutes dated Apr. 24, 1995 ("Apr. 24 Minutes"), Exh. 30 to Brighton SMF, at 2-3. Accordingly, the Board was told that it would take at least nine months to complete the transition whereby Brighton would cease to offer obstetrics/gynecology services. *Id.* at 3. What Donovan does make clear in his deposition is that, whatever was discussed about the status of Flaherty, Gotschlich and McRea at the Board meeting, the possibility that they would move their practice to Mercy Hospital was of concern to Brighton at the time. Donovan Dep. at 145.

and Apr. 24 Minutes at 1, 7. Kenneth Lageroos, chair of the hospital's medical staff, was also present at the meeting. Apr. 24 Minutes at 1, 5. The Board's vote on the plaintiff's status occurred after an executive session that lasted nearly three hours. *Id.* at 6. The plaintiff was not present.[19] *Id.* at 1. The trustees did not review the transcript of the hearing or any of the exhibits admitted into evidence in connection with that proceeding.[20] Rather, Meyerhoefer and Lageroos addressed the Board, the latter in his capacity as chair of the Staff Executive Committee. Carvel Dep. at 43. Meyerhoefer went through a chronology of events concerning the plaintiff, using a set of demonstrative exhibits placed on a series of easels. *Id.* The plaintiff did not receive this material until after the Board had made its decision. Affidavit of William Zelman, D.O. ("First Zelman Aff.") (Docket No. 80) at ¶ 12.

Pursuant to parts 4 and 5 of Brighton's Fair Hearing Plan, the Board issued its written decision on April 25 and the plaintiff made a timely request for appellate review. Donovan Aff. at

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[19] It is the plaintiff's assertion that he was "not permitted to be present" at this meeting. Plaintiff's Memorandum at 24. He offers no record citation for the proposition that he was excluded, and I am therefore unable to so determine for summary judgment purposes. More generally, I would note that the circumstances of the April 24 Board meeting are central to the plaintiff's contention that the defendants are not immune from money damages. *See* discussion of Health Care Quality Improvement Act, *infra*. It is therefore particularly troubling that no factual allegations concerning this meeting appear in either of the plaintiff's factual statements submitted pursuant to Local Rule 19.

[20] The portions of the record cited for this factual proposition by the plaintiff (again, in his memorandum rather than in either of his Statements of Material Facts) do not actually establish that the trustees failed to consider the hearing transcript or record at their April 24 meeting. Rather, one Board member stated that she did not recall seeing any such materials in the Board room at this meeting. Deposition of Shelley S. Carvel ("Carvel Dep.") at 41. Two other Board members stated that they have never read the transcript nor reviewed the exhibits. Donovan Dep. at 139-40; Roy Dep. at 131. For purposes of the defendants' summary judgment motions, this evidence is a sufficient basis for drawing the plaintiff-favorable inference that these materials were not present at the April 24 meeting.

¶¶ 18-19 and Exh. K thereto; Bylaws at ch. II, parts 4-5. The Board conducted its appellate review on May 17, 1995, at which the plaintiff was represented by counsel. Deposition of Richard L. Roy, Jr. ("Roy Dep.") at 169, 172; Brighton Medical Center Board of Trustees Minutes dated May 17, 1995 ("May 17 Minutes), Exh. 34 to Brighton SMF, at 5-6. The Board voted to reaffirm its previous decision. May 17 Minutes at 6. Flaherty was again present, but did not participate in the discussion or the vote. *Id.*; Flaherty Dep. at 332-37.

As provided for in section 6.7 of the Fair Hearing Plan, the plaintiff formally asked the Board to reconsider this decision. Donovan Aff. at ¶ 24; Bylaws, ch. II, § 6.7. After staying the revocation of the plaintiff's staff privileges, the Board voted on July 19, 1995 to change the sanction imposed against the plaintiff from revocation of staff privileges to a 30-day suspension.[21] Brighton Medical Center Board of Trustees Minutes dated July 19, 1995, Exh. 38 to Brighton SMF, at 4; Donovan Aff. at ¶ 26. Flaherty was not present at this meeting. *Id.* at ¶ 27.

The plaintiff served his suspension from July 25 through August 24, 1995. Zelman Dep. at

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[21] The plaintiff contends in his memorandum of law that it is reasonable to infer that Brighton changed the sanction from termination of staff privileges to suspension because it feared antitrust liability. In support of this contention, the plaintiff notes that the instant proceeding was already pending by this point in the saga, and that, during a deposition, "[w]hen asked whether the change in sanction was motivated by the fear of exposure to antitrust liability, BMC [i.e., Brighton] asserted the attorney client privilege." Plaintiff's Memorandum at 26; *see also id.* at 32 (to same effect in Statement of Material Facts). Although the Federal Rules of Evidence do not address this issue, there is some authority in this circuit for the proposition that a claim of privilege may be a proper basis for a negative inference in a civil action. *See F.D.I.C. v. Elio*, 39 F.3d 1239, 1248 (1st Cir. 1994) (assertion of privilege against self-incrimination at deposition). I decline to draw the requested inference for two reasons. First, there is nothing in the record to indicate that the deposition witness in question -- Richard L. Roy, Jr., chairman of Brighton's Board of Trustees -- was testifying on behalf of Brighton pursuant to Rule 30(b)(6), and thus it would be a speculative leap to impute his assertion of attorney-client privilege to Brighton. Second, materiality is lacking. The issue is whether Brighton violated federal and state antitrust law, not whether it was concerned about a possible violation at some point in the plaintiff's association with the hospital.

19. During this period, the plaintiff maintained his office practice and continued to see patients. *Id.* at 202. He referred patients in need of hospital-based services to four medical doctors. *Id.* at 163, 165. He also performed hospital-based gynecological procedures himself during the suspension period at Westbrook Community Hospital, located in a municipality immediately adjacent to Portland. *Id.* at 14-15, 694. And he was out of state on vacation, and therefore not seeing patients, from August 9 through August 17. *Id.* at 396, 398, 399.

As relations between the plaintiff and Brighton deteriorated, the plaintiff sought staff privileges at Mercy Hospital, also located in Portland. Ultimately, however, the plaintiff withdrew his application in March 1996 upon being told that Mercy's credentials committee had forwarded a negative recommendation on his application to that hospital's executive committee. Deposition of Steven A. Hess, M.D. ("Hess Dep.") at 135, 141-42. The plaintiff withdrew his application, rather than risk an ultimately unfavorable decision by Mercy, in order to avoid having such a determination be disclosed to various state and national reporting agencies. *Id.* at 135; Zelman Dep. at 1060. The plaintiff worked at the University of New England Health Clinic in Biddeford on a contract basis beginning in October 1994, but lost his position there because he lacked admitting privileges at a full-service hospital. Deposition of Jacqueline B. Cawley, D.O. at 17-18; Second Zelman Aff. at ¶ 58. He has applied for but has not obtained staff privileges at Maine Medical Center. Second Zelman Aff. at ¶ 56. The plaintiff has shut down his Portland practice and is not otherwise practicing medicine in the area. *Id.* at ¶ 59.

All of the foregoing has taken place against the backdrop of significant changes in the Portland health care industry involving Brighton, Mercy and the city's other major hospital, Maine Medical Center. In March 1995 Brighton merged with Maine Medical Center, with Brighton

becoming a subsidiary of Maine Medical Center's holding company. Deposition of James Donovan ("Donovan Dep.") at 9-10. Despite the merger, Brighton's Board of Trustees continued to function, hence its deliberations described above. *Id.* at 11. Part of the merger involved the discontinuation of inpatient obstetrics/gynecology services at Brighton as of December 1995. *Id.* at 86-87.

The plaintiff resigned voluntarily from his staff position at Brighton in December 1995 because the hospital closed the obstetrics/gynecology section. Zelman Dep. at 174, 679-81. Flaherty, McRea and Gotschlich began offering inpatient services through Mercy Hospital, which was not involved in the merger. Flaherty Dep. at 343, 350. In fact, their decision to begin practicing in Mercy, communicated to officials of Brighton in the fall of 1995, had the effect of causing Brighton and Maine Medical Center to move up the date for closing the obstetrics/gynecology section at Brighton from the spring of 1996 to December 1995. Deposition of F. Stephen Larned ("Larned Dep.") at 61-62.

Notwithstanding the plaintiff's stormy tenure at Brighton, he performed almost 300 medical procedures at the hospital and none involved any significant complications. Second Zelman Aff. at ¶ 17. For purposes of the defendants' summary judgment motions, the court must assume that the quality of care provided to Brighton patients by the plaintiff was of superior quality. *See* Zerner Report (last page) (so assessing plaintiff's cases). He enjoyed cordial relations with his employees, Deposition of Allison Thayer at 61-62, Brighton's medical residents and interns, Deposition of Ira W. Stockwell ("Stockwell Dep.") at 113, and patients, Affidavit of Christine Brennan, appended to Plaintiff's Memorandum, at ¶ 5.

The court must also credit for summary judgment purposes the plaintiff's assertion that the services provided by doctors of osteopathic medicine are not interchangeable with those provided

by so-called allopathic physicians with MD degrees. The record reflects that significant differences in philosophy and approach to patient care exist between osteopathic and allopathic physicians. Stockwell Dep. at 28; Deposition of Guy Defeo, D.O. at 89-93; Deposition of Dr. Craig R. Wallingford at 34-35; Second Zelman Aff. at ¶ 2. This difference is recognized within the medical professions and by consumers of medical services. Brennan Aff. ¶ 3; Affidavit of Debra Leeman, appended to Plaintiff's Memorandum, at ¶¶ 3-4; Affidavit of William G. Shepherd, Ph.D. ("Shepherd Aff."), appended to Plaintiff's Memorandum, at ¶ 15. The credentialling, education and trade organizations of osteopaths are different from those of allopathic physicians. Second Zelman Aff. at ¶ 3. Patients who prefer the services of osteopathic physicians do not consider the services of allopathic physicians to be an adequate substitute for those of osteopaths. Brennan Aff. at ¶ 4; Leeman Aff. at ¶ 5.

Patients who require the services of a specialist in obstetrics/gynecology tend to choose a doctor who is close to their home. Second Zelman Aff. at ¶ 15; Shepherd Aff. at ¶ 42. Although the plaintiff's expert and the expert retained by Brighton offer contrasting opinions on the subject, *see* Shepherd Aff. at ¶ 38; Affidavit of Barry C. Harris, Exh. 43 to Brighton SMF, at ¶ 50 and Exhs. 3 and 4 thereto (suggesting that the relevant geographic market includes areas served by hospitals as far away as southwestern New Hampshire and central Maine), for purposes of the defendant's summary judgment motion the court must credit the plaintiff's assertion that the relevant geographic market consists of greater Portland.[22] With the plaintiff no longer practicing in the Portland area,

[22] In support of their summary judgment motions, the defendants cite certain statistical data provided by their expert. *See* Brighton SMF at ¶¶ 158-61, 189-92, ; Downeast SMF at ¶¶ 138, 189-92. It appears that the major sources of this data are the Maine Health Care Finance Commission, the Maine Department of Health, Maine Medical Center, Brighton Medical Center and certain other (continued...)

the only osteopaths in the area available to patients who require surgical services in the field of obstetrics/gynecology were McRea and Flaherty. Stockwell Dep. at 96.

III. Health Care Quality Improvement Act

The defendants invoke the Health Care Quality Improvement Act to contend that they are immune from money damages in this proceeding. With exceptions not relevant here, the Act immunizes from civil damages participants in a "professional review action" conducted by a "professional review body" evaluating the "competence or professional conduct of an individual physician" that "affects or could affect adversely the health of welfare of a patient or patients." 42 U.S.C. §§ 11111(a)(1) and 11151(9). The purpose of the Act is to encourage the identification and disciplining of incompetent or unprofessional physicians and, conversely, to deter antitrust suits by such practitioners. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 632-33 (3d Cir. 1996) (citations omitted); *see also* 42 U.S.C. § 11101(4) (congressional finding that threat of money damages, including treble damages in antitrust cases, "unreasonably discourages physicians from participating in effective professional peer review").

However, the Act makes clear that its provisions do not place beyond the reach of damages claims any and all acts that are done under the guise of peer review in the medical professions. Rather, to qualify for immunity, the professional review action must be taken

(1) in the reasonable belief that the action was in the furtherance of quality health

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[22](...continued)
Maine hospitals. *See* Exhs. 5-27 to Harris Aff. As the plaintiff points out, where an expert witness such as Harris is presumably entitled to rely on such data in forming his opinion, *see* Fed. R. Evid. 703, the data itself, as presented by Harris, is likely hearsay and therefore not of evidentiary quality for summary judgment purposes. The issue is not significant because, in my view, the fate of the plaintiff's claims does not turn on the statistical data or the geographic scope of the relevant market.

> care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a). The statute further provides that a professional review action is presumed to have met the four standards enumerated here "unless the presumption is rebutted by a preponderance of the evidence." *Id.* This "alters the typical summary judgment scenario" in a case where the plaintiff is the non-moving party. *Benjamin v. Aroostook Medical Ctr.*, 937 F. Supp. 957, 973 (D. Me. 1996); *see also Winship Green Nursing Ctr., supra* (stressing requirement to adduce specific facts when non-movant has burden of proof, notwithstanding plaintiff-favorable review of record by court).

Although section 11112 speaks in terms of reasonable belief and reasonable efforts, all of the circuit courts that have considered the issue have applied an objective test to the Act's test for immunity. *See Brown v. Presbyterian Healthcare Servs.*, 1996 WL 685700 at *8 (10th Cir. Nov. 29, 1996); *Mathews*, 87 F.3d at 635; *Imperial v. Suburban Hosp. Assn., Inc.*, 37 F.3d 1026, 1030 (4th Cir. 1994); *Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1335 (11th Cir. 1994), cert. denied, 115 S. Ct. 1363 (1995); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994), *cert denied*, 115 S. Ct. 1400 (1995)). As the Eleventh Circuit observed in *Bryan*, the applicability of an objective standard is rooted in the Act's legislative history. *Bryan*, 33 F.3d at 1323 (noting that drafters of Act rejected "good faith" standard as too subjective, in favor of "more objective" standard of

reasonableness) (citation omitted). The plaintiff embraces rather than rejects this standard. *See* Plaintiff's Memorandum at 34 ("there is more than sufficient evidence of objectively unreasonable conduct to require denial of the summary judgment motions").

Yet the applicability of the objective standard has enormous implications for the plaintiff's case. Much of it is premised on evidence that Flaherty, Gotschlich and McRea were the plaintiff's sole competition in what the plaintiff regards as the relevant market, had decided from the moment the plaintiff first undertook to practice in Portland that they did not want him there, and actively used their staff affiliations at Brighton to advance that end. The summary judgment record is rife with evidence that would justify an inference of such nefarious intent. But under the Act's objective standard, "bad faith is immaterial. The real issue is the sufficiency of the basis for the [defendants'] actions." *Bryan*, 33 F.3d at 1335 (citation omitted). In other words, if "the court could conclude that the professional review action would further quality health care," summary judgment in favor of the defendants is appropriate.[23] *Mathews*, 87 F.3d at 635. Indeed, the Act does not even require that the professional review result in an "actual improvement" of the quality of health care, so long as it was objectively reasonable for the actors to believe they were seeking that end. *Imperial*, 37 F.3d at 1030.

The plaintiff's argument does not track the four objective standards laid out in section

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[23] *Strauss v. Peninsula Regional Medical Ctr.*, 916 F. Supp. 528 (D. Md. 1996), cited by the plaintiff, provides no authority to the contrary. At issue in *Strauss* was whether the termination of two physicians' memberships on a hospital staff, in alleged violation of the institution's bylaws, was a breach of contract. *Id.* at 529, 543-44. The defendants argued that the matters at issue were *not* covered by the Health Care Quality Improvement Act, and the court's opinion has nothing to say whatsoever about the scope or nature of immunity thereunder. *See id.* at 543 (discussing "balanc[ing] the equities" in determining whether hospital required to conduct hearing, as a matter of California contract law) (citation omitted).

11112(a), but rather focuses on several aspects of the peer review process at Brighton that he contends were objectively violative of the Act, without always making clear which of the standards the plaintiff asserts the defendants have failed to meet. At three separate junctures, the plaintiff refers to the requirements in paragraphs (1) and (2) of 11112(a). *See* Plaintiff's Memorandum at 37, 39, 43. However, in applying the objective standard set forth in the applicable case law, I have taken care to test the defendants' conduct against all four specific requirements of the statute.

I begin by rejecting the plaintiff's contention that immunity is unavailable to the defendants because they acted for reasons unrelated to the plaintiff's clinical competence. *Bryan* illuminates the flaw in the plaintiff's position on this issue. In that case, the plaintiff was "generally acknowledged to be an excellent surgeon." *Bryan*, 33 F.3d at 1323-24. The asserted basis for the plaintiff's termination was a "pattern of unprofessional conduct" and "difficulties in interacting with other staff members." *Id.* at 1335. The Eleventh Circuit concluded that such concerns were the basis for a reasonable belief that termination of the physician's staff privileges would "promote quality health care" as required by paragraph 1 of section 11112(a). *Id.* Assuming that there were no legitimate issues concerning the plaintiff's actual performance as a physician, concerns relating to his ability to submit to the process of peer review, and work cooperatively with colleagues and other hospital staffers generally, are unassailably within the bounds of those concerns that promote quality health care.

The plaintiff also points to the conflict between the negative evaluation given to several of his cases by McRea in September 1993 and the favorable reports on those same cases -- both Gotschlich's evaluations prior to McRea's review, and Zerner's outside review conducted after McRea's assessment. It is the plaintiff's contention that McRea's actions in the fall of 1993 were

not taken in the reasonable belief that he was furthering quality health care, nor after a reasonable effort to obtain the facts, as required by paragraphs 11112(a)(1) and (2). I disagree. While such evidence might lead a factfinder to question the correctness of McRea's evaluations, and in combination with other evidence could permit a factfinder to infer that something other than medical science had influenced his judgment, this is irrelevant to the question at hand. The "[m]ere participation" in the evaluative process by one of the plaintiff's competitors is insufficient to defeat immunity under the Act. *Mathews*, 87 F.3d at 636; *see also Crosby v. Hospital Auth. of Valdosta*, 873 F. Supp. 1568, 1583 (M.D. Ga. 1995), *aff'd*, 93 F.3d 1515 (11th Cir. 1996), *petition for cert. filed* (U.S. Dec. 10, 1996) (No. 96-145). And even assuming the Board of Trustees ultimately relied on McRea's views rather than those of Zerner or Gotschlich on the cases evaluated, this generates a factual issue solely on the quality of the care provided rather than the issue of whether reliance on McRea's views was reasonable. *Mathews*, 87 F.3d at 636 n.9.

The Tenth Circuit's decision in *Brown*, published well after the briefing was completed on the pending motions and therefore not cited by any of the parties, provides some authority to the contrary. In *Brown*, the issue was whether the trial court had erred at the conclusion of a jury trial in not finding the defendants immune as a matter of law in a case involving the revocation of a physician's hospital privileges. *Brown*, 1996 WL 685700 at *1, *7. The jury heard testimony from a physician, called by the plaintiff, that the peer review panel opting to revoke the plaintiff's privileges conducted an inquiry that was "unreasonably narrow" because it involved only two of the patients treated by the plaintiff. *Id.* at *8. The Tenth Circuit therefore determined that a reasonable jury could have concluded that the peer review was not undertaken after a "reasonable effort to obtain the facts" as required by section 11112(a)(2) of the Act. *Id.* Frankly, I find this holding

difficult to square with the other cases discussed above because, it seems to me, a reasonable jury could also have determined that the facts surrounding the two cases were sufficiently egregious to warrant termination of the plaintiff's privileges regardless of what a broader review of the plaintiff's work would have revealed. Given that the defendants enjoyed a presumption that their factfinding efforts were reasonable, *Mathews*, 87 F.3d at 637, I think the defendants are entitled to the benefit of the doubt in such circumstances, *cf. Islami v. Covenant Medical Ctr., Inc.*, 822 F. Supp. 1361, 1377 (N.D. Iowa 1992) (peer review panel failed to follow hospital bylaws, precluding summary judgment for defendants). In any event, the plaintiff here does not allege that the scope of the hearing panel's review was unfairly circumscribed and I therefore consider *Brown* to be inapposite.

Nor do I agree with the plaintiff's contention that he gains a foothold from the assumption, for summary judgment purposes, that Flaherty participated in the drafting the Staff Executive Council's written statement to the trustees concerning the Fair Hearing report. Were a factfinder to so conclude after trial, that determination might cast doubt on Flaherty's credibility as a witness -- assuming he continues to testify, as he did at his deposition, that he did not take part in drafting this letter. But it is the fairness of the professional review process -- not the credibility of Flaherty -- that is at issue here. Considering the totality of the circumstances, *Imperial*, 37 F.3d at 1030, the overall fairness of the hospital proceedings was not implicated by Flaherty's behind-the-scenes participation in drafting a written submission to which he did not sign his name and about which he did not comment personally before the Board.

The weightiest issue raised by the plaintiff on the immunity question concerns the actions of the Board in deviating from the recommendations of the Fair Hearing panel. The unmistakable flavor of what transpired is this: The hearing panel saw fit to criticize both the plaintiff's conduct

as uncooperative and the obstetrics/gynecology section's actions as unfair for causing the plaintiff to be subjected to peer review by his economic competitors. Therefore, in recommending a two-week suspension the panel sought to assume the role of peacemaker -- a gesture rebuffed by the Board of Trustees.

However, contrary to the assertion of the plaintiff, the hospital caused no self-inflicted blow to its immunity under the Act when the trustees adopted a sanction that was more severe than that recommended by the hearing panel. That decision carries an unmistakable flavor of its own: that the hospital's ultimate governing authority, comprised not simply of doctors who were colleagues and/or supervisors of the plaintiff but also of others not directly involved in the situation, had exhausted its patience with the plaintiff's intransigent stance concerning peer review of his cases. *See* Exh. Q to Donovan Dep. (written Board decision noting that plaintiff "did not give the hospital's peer review system the opportunity to work. If Dr. Zelman had participated, then his concerns about fairness would have been allayed. Unfortunately, he chose only to take the path of greatest resistance -- confrontation.").

Nothing in the Act or the hospital's Fair Hearing Plan obligated the trustees to adopt the findings of the hearing panel or to eschew the imposition of a sanction that was more severe than the hearing panel had recommended.[24] *See Smith*, 31 F.3d at 1487 (peer review proceedings conducted pursuant to Health Care Quality Improvement Act not required "to look like regular trials in a court

[24] The plaintiff takes the opposite position in his motion for partial summary judgment on the contract claim. It is the plaintiff's contention that the Brighton bylaws, particularly its Fair Hearing Plan, required the Board to consider itself bound by the factual findings made by the Fair Hearing panel. However, the plaintiff points to no specific contractual language in support of this contention, and acknowledges a lack of authority under the Act for such a position. Instead, the plaintiff relies on "analogous administrative authority." Plaintiff's Motion for Partial Summary Judgment (Docket No. 77) at 17. I find the analogy unpersuasive.

of law"). An illustrative case is *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). In that case, the Ninth Circuit agreed that summary judgment in favor of a defendant hospital and certain of its physicians in an antitrust case was proper in light of the immunity provisions of the Act. *Id.* at 736. This was so even though that hospital's hearing panel made findings that were favorable to the plaintiff, subsequent to the suspension that formed the basis of his antitrust claim. *Id.* at 735. The hearing report in *Austin* did not exonerate the plaintiff but, rather, criticized as "below the applicable standard" his treatment of a particular patient and therefore recommended "significant restrictions" short of a suspension. *Id.* In light of these findings by the hearing panel, "no reasonable jury could find that the [hearing panel] report is sufficient to establish the nonexistence of the defendants' "reasonable belief" and "reasonable effort"" as required by the Act *Id.* The only difference here is that the hearing report antedated the challenged sanction. What *Austin* makes clear is that, under the Act, a hearing panel may disagree with hospital officials as to the ultimate reasonableness of the sanction imposed, but that is "a different question of 'reasonableness' . . . than the issue whether the defendants acted in the 'reasonable belief that the [sanction] was warranted by the facts known after reasonable efforts to obtain facts' as required by section 11112(a)(4)." *Id.*; *see also Bryan*, 33 F.3d 1329, 1337 (Board acted reasonably in opting for termination of staff privileges in fact of conflicting recommendations by executive committee, hearing panel and outside review panel). Moreover, given that it is appropriate to assess this reasonableness in the totality of the circumstances, it is noteworthy that the trustees ultimately rescinded their decision to terminate the plaintiff's staff privileges and imposed the same form of punishment recommended by the hearing panel -- a suspension -- albeit for 30 days rather than two weeks. This only serves to buttress the objective

reasonableness of the Board's actions.[25]

Likewise, the plaintiff does not successfully rebut the presumption of fairness by pointing out that the entire record of the Fair Hearing process was not presented to the Board of Trustees, that he was unable to rebut the argument made to the Board on April 24, 1994 by Meyerhoefer and Lageroos, and that he was unable to challenge by cross-examination or otherwise the matters raised in their presentation. As the Eleventh Circuit suggested in *Bryan*, that the ultimate decisionmaker fails to review the entire record of an earlier stage in the process does not defeat the "fairness" presumption absent some suggestion that the plaintiff was unable to provide the Board with whatever items from the prior record that he deemed appropriate. *Id.* at 1329-30 n.18. Significantly, the plaintiff does not contend that he lacked an opportunity to make such a presentation prior to the Board's decision, nor does he identify any information considered by the Board that was not available to him and about which he was unable to comment in his written and oral statements to the Board.[26] In these circumstances, the scope of evidence and arguments considered by the Board does not take its decisionmaking process beyond the boundaries of objective reasonableness.

Finally, the plaintiff seeks to defeat the defendants' immunity under the Act by drawing the

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[25] I make this observation notwithstanding the plaintiff's contention that Brighton moderated its position out of fear of antitrust liability. As noted, *supra*, such an inference is not warranted. Even if it were, the most that could be said in the present context is that Brighton and/or its trustees had concerns about the reasonableness of its actions to date. Since the standard is one of objective reasonableness, any such subjective assessments are irrelevant.

[26] The only possible exception are two warning letters issued to the plaintiff in 1993, which the plaintiff contends were not part of the Fair Hearing record but were referred to in the time line considered by the Board. Plaintiff's Memorandum at 25 n.19. The plaintiff does not take the position that he never received such warnings, nor does he suggest that the Board read the actual letters. To the extent that the Board's attention was drawn to the existence (as distinct from the contents) of two documents that were not considered by the hearing panel, such an error is *de minimis* in terms of its implications for the fairness of the proceedings.

court's attention to the oppressive coverage arrangement unilaterally imposed on him by Flaherty, Gotschlich and McRea in April 1994. If the mere participation of the plaintiff's economic competitors in the professional review process does not taint that process, it follows that actions taken by those competitors, wholly outside the process, do not have the effect of divesting the professional review activities themselves of the immunity afforded by the Act. Obviously, however, it also follows that the unilateral imposition of such onerous coverage terms might itself generate antitrust liability.[27] I take up that issue, *infra*.

In resisting the defendants' assertion of immunity under the Act, the plaintiff refers to an observation by the principal sponsor of the legislation that immunizing hospital peer review was not intended to protect illegitimate or anticompetitive actions taken under the guise of improving the quality of health care. Plaintiff's Memorandum at 33. Accepting that premise, it is still my opinion that this is precisely the sort of case the Act was intended to divert from the path to trial and/or the elaborate economic analysis required for substantive evaluation of antitrust claims. Prior to the measure's enactment, summary judgment would have been impossible here on the ground that the peer review at issue was undertaken for benevolent rather than anticompetitive purposes -- given the active involvement of three doctors who, the court must infer, were willing to use Brighton's peer review to further their desired goal of driving a competitor out of business. The Act now requires the court to shift the inquiry from their subjective intent to the objective issue of whether the peer review as conducted by the hospital was fair, oriented toward promoting quality health care, and not

[27] The same reasoning would apply to the alleged acquisition by Flaherty, Gotschlich and McRea of computer data from Brighton concerning the procedures performed by the plaintiff at Brighton. However, as I have already noted, the plaintiff does not point the court to anything in the record indicating that this data was so transmitted. Accordingly, I am unable to credit the plaintiff's assertion that such a transfer of information actually took place.

anticompetitive notwithstanding the participation of these bad actors.

The Health Care Quality Improvement Act "clearly grants broad discretion to hospital Boards with regard to staff privileges decisions." *Bryan*, 33 F.3d at 1337. Accordingly, the role of the federal court in reviewing such determinations is not to substitute its judgment for that of the Board or to "reweigh" the evidence. *Id.* (citation omitted). While expressing no view about the substance of the hospital's decision, particularly the wisdom of spurning the compromise offered by its own Fair Hearing panel, I am convinced that the process employed by the hospital was objectively reasonable and fair. In other words, no reasonable jury could conclude by a preponderance of the evidence that Brighton did not act in the reasonable belief that it was furthering quality health care, after a reasonable effort to obtain the facts, after employing procedures that were fair to the plaintiff in the circumstances, in the reasonable belief that the action was warranted by the facts known thereby.

IV. Other Issues

The plaintiff's original complaint, filed at a juncture when Brighton had decided to terminate his staff privileges, sought preliminary and permanent injunctive relief. Complaint (Docket No. 1) at pp. 29-30. Noting the subsequent moderation of the sanction to that of a 30-day suspension, the court entered an order denying the request for a preliminary injunction, citing a lack of irreparable harm. Order Denying Injunctive Relief (Docket No. 22). The major changes in Portland's health care industry, i.e, the merger of Brighton and Maine Medical Center, overtook the events giving rise to this lawsuit. The resulting demise of Brighton's obstetrics/gynecology section occasioned the plaintiff's voluntary resignation from the hospital's staff and, obviously, made it of no use to the

plaintiff to invoke the court's equitable powers to maintain his staff relationship with Brighton. Accordingly, the requests for injunctive relief are absent from his amended complaint.

Given that the plaintiff seeks only money damages, the immunity provisions of the Health Care Quality Improvement Act are dispositive of all pending claims and their substantive discussion is unnecessary. It is also unnecessary to discuss the defendants' contention that, as to the claims arising under Maine law, they enjoy state-law immunity. Further, the plaintiff's summary judgment motion, which seeks to establish Brighton's liability on his breach-of-contract claim, is moot in the face of Brighton's immunity from damages.

The summary judgment record yields only one factual sliver that, while arguably part of the antitrust conspiracy and monopolization effort alleged by the plaintiff, does not fall within the scope of peer review immunized from money damages. I refer to the decision in April 1994 by Flaherty, Gotschlich and McRea to impose on the plaintiff the economically onerous condition that he pay them $1,000 for each day he required them to cover for him. However, the record further establishes that the plaintiff was able to obtain coverage elsewhere, and thus the record is devoid of evidence that the defendant physicians' unfriendly act had any effect on his medical practice. The requisite antitrust injury is therefore lacking, whether such action by these defendants is assessed as possible evidence of an antitrust conspiracy, of an effort to monopolize or of the anticompetitive behaviors enjoined by Maine's antitrust statute. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984) (absent per se violation of antitrust law, plaintiff must prove "actual effect" on competition); *Sullivan v. National Football League*, 34 F.3d 1091, 1096-97 (1st Cir. 1994) (anticompetitive effects measured by reduction in output and price increase in relevant market), *cert. denied*, 115 S. Ct. 1252 (1995); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 856 (9th Cir.) (conduct

determined to be not in restraint of trade also insufficient to support monopolization claim) (citation omitted), *cert. denied*, 116 S. Ct. 170 (1995); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1081 (1st Cir. 1993) (Maine antitrust statutes parallel federal counterparts), *on remand*, 875 F. Supp. 8, 14 (D. Me. 1994) (same).

V. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for summary judgment be **GRANTED** and that the plaintiff's motion for partial summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of January, 1997.

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David M. Cohen
United States Magistrate Judge